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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9620

WILLIAM I. CONNELLY AND BERTHA CONNELLY,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of Decision of the Tax Court of the United States.

JOINT APPENDIX.

1 **Docket Entries.**

1946

Mar. 22—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 22—Copy of petition served on General Counsel.

Mar. 22—Request for hearing at Washington, D. C. filed by taxpayer. 4/2/46 granted.

Apr. 24—Answer filed by General Counsel.

Apr. 25—Copy of answer served on taxpayer, Washington, D. C.

Aug. 21—Hearing set Oct. 28, 1946, Washington, D. C.

Oct. 28—Hearing had before Judge Leech on merits. Ordered submitted. Stipulation of facts filed at hearing. Petitioner's brief due Dec. 9, 1946; Respondent's brief due Jan. 18, 1947; Petitioner's reply due Feb. 8, 1947.

Nov. 6—Transcript of hearing 10/28/46 filed.

Dec. 9—Brief filed by taxpayer (2). Copy served by attorney.

Dec. 20—Stipulation to correct the transcript filed.

1947

Jan. 21—Motion for extension to Feb. 3, 1947 to file brief filed by General Counsel. 1/21/47 Granted and petitioner to 2/24/47 for reply.

Jan. 23—Brief filed by General Counsel. Served.

Feb. 21—Reply brief filed by taxpayer. 2/24/47 Copy served.

Apr. 21—Findings of fact and opinion rendered, Judge Leech. Decision will be entered for respondent. Copies served.

Apr. 22—Decision entered, Judge Leech, Div. 6.

May 20—Motion for leave to withdraw as counsel (William E. Koken) filed.

May 20—Entry of appearance of Caesar L. Aiello as counsel filed.

May 20—Motion for rehearing and for reconsideration filed by taxpayers. 5/22/47 Denied.

Jul. 16—Stipulation as to venue filed.

Jul. 16—Petition for review by U. S. Court of Appeals for the District of Columbia filed by taxpayers.

Jul. 16—Statement of points filed by taxpayers.

Jul. 16—Designation of record filed by taxpayers.

Jul. 16—Proof of service of petition for review, statement of points and designation filed.

• • • • • • • • • •

Petition.

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols 1942-284286, 1943-355980, 1944-7161500) dated February 26, 1946, and, as a basis of their proceeding, allege as follows:

1. The petitioners are husband and wife residing at 531 West Great Falls Street, Falls Church, Virginia. The returns for the periods here involved were filed with the Collector for the District of Virginia.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitoners on February 26, 1946.

3. The taxes in controversy are income taxes for the calendar years 1943 and 1944. The deficiencies asserted are as follows:

1943	$433.59
1944	227.10

making a total of $660.69, all of which is in controversy.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

3 (a) The Commissioner erred in disallowing as an exclusion from the income of the petitioner William I. Connelly for the taxable years 1943 and 1944 as authorized by law the additional annual allowance of $1,500 provided by law for military and naval personnel.

(b) The Commissioner erred in disallowing as a deduction from the income of the petitioners for the taxable year 1943 as authorized by law the sum of $75 from the petitioners' allowable deduction for medical expenses of $134.65.

(c) The Commissioner erred in disallowing as an exclusion from the income of the petitioner William I. Connelly for the taxable year 1944 as authorized by law the sum of $2,171.10 as allowances for quarters and subsistence.

5. The facts upon which the petitioners rely as the basis of their appeal are as follows:

(a) The petitioner William I. Connelly was enrolled under section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, as a temporary member of and performed full-time active service and duty in the Coast Guard Reserve in the ranks of Lieutenant Commander and Commander during the taxable years 1943 and 1944. The said petitioner was enrolled for such active service and duty without pay other than the compensation of the civilian position which he held in the United States Coast Guard on the date of his enrollment, and the said petitioner continued to receive such compensation during the period of his enrollment the duration of which was from February 19, 1943 to September 15, 1945.

4 The petitioners assert that by virtue of the enrollment of the petitioner William I. Connelly for and performance by him of full-time active service and duty he was a member of and performed full-time active service and duty in the military or naval forces of the United States during the taxable years 1943 and 1944; that he was not in a civilian status during the period of his enrollment; that the compensation which he received from the United States during the period of such active service and duty in such forces was received for and in respect of such active service and duty within the meaning of and as provided by section 22(b)(13), as amended, of the Internal Revenue Code, and Regulations thereunder; and that the petitioners are therefore entitled to exclude from such compensation for the taxable years 1943 and 1944 the additional annual allowance of $1,500 provided by the said provision for military and naval personnel.

(b) Medical expenses incurred by the petitioners for the taxable year 1943 exceeded 5% of their net income for that period by $134.65, and are therefore deductible by the said petitioners in that amount as authorized by law.

(c) The petitioners further assert that the compensation received by the petitioner William I. Connelly from the

United States during the taxable year 1944 during and for full-time active service and duty in the military or naval forces was in lieu of the pay and allowances provided by the Pay Readjustment Act of 1942, as amended, for the ranks held by the said petitioner, and which would have been otherwise payable to him, and that the petitioners are therefore entitled to exclude from such compensation an amount which equals the allowances for quarters and subsistence provided by law for the ranks held by the petitioner William I. Connelly.

Wherefore, the petitioners pray that this court may hear the proceeding and disallow the deficiency as asserted by the Commissioner, and determine the amount of the overpayment made by the petitioners for the years 1943 and 1944, and that the court may grant such other and further relief as the nature of the case may require.

William E. Koken,
WILLIAM E. KOKEN,
432 Shoreham Building,
Washington 5, D. C.
Attorney for the Taxpayers

DISTRICT OF COLUMBIA: SS:

William I. Connelly and Bertha Connelly, being duly sworn, say that they are the petitioners above named; that they have read the foregoing petition, or had the same read to them, and are familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those they believe to be true.

William I. Connelly
WILLIAM I. CONNELLY

Bertha Connelly
BERTHA CONNELLY

Subscribed and sworn to before me
this 21 day of March, 1946.
FRANCIS B. MYERS

6 EXHIBIT "A"

Treasury Department
Internal Revenue Service
Richmond, Va.

February 26, 1946

Office of the Collector
District of Virginia
Parcel Post Building
Address reply to Collector
of Internal Revenue and
refer to

1942——284286
1943——355980
1944——7161500

William I. Connelly, Commander, U.S.C.G.R. and
Mrs. Bertha Connelly
531 West Great Falls Street
Falls Church, Virginia

Dear Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year(s) 1943 and 1944 discloses a total deficiency of $433.59(1943) $227.10(1944) $660.69, as shown in the statement attached.

In accordance with the provisions of existing Internal Revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may fil a petition with the Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed Form and forward it to the Collector of Internal Revenue, Richmond, Virginia, for the attention of IT:AUDIT. The signing and filing of this form will

expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the Form, or on the date assessment is made, whichever is earlier.

Respectfully,

Jos. D. Nunan, Jr.,
Commissioner

By N. B. Early, Jr.
Collector

Enclosures:
Statement
Form of Waiver

Copy

January 31, 1946

IT:AUDIT:FEM:EHS
1943——355980

William I. Connelly, Lt. Comdr., USCGR
Mrs. Bertha Connelly
531 West Great-Falls Street
Falls Church, Virginia

Dear Commander and Mrs. Connelly:

Preliminary audit of your 1943 income and victory tax return discloses that you have excluded from gross income for 1943, $1500.00, the special allowance granted members of the armed forces for active service.

As stated in letter addressed to you relative to your 1944 income tax return, when a temporary member of the Coast Guard Reserve receives no compensation except that from civilian sources or from a civilian government payroll, such compensation is regarded as not being remuneration for services as a member of the military of naval forces of the United States for active service in such forces within the intendment of Section 22(b)(13) of the Internal Revenue

Code as amended. Accordingly he may not exclude from gross income $1500.00 of his civilian pay.

Since Commander Connelly was in civil status in 1943 and received his compensation from a civil service civilian payroll the entire amount of such income is taxable.

Since there is an increase in income and since medical expense is deductible only to the extent of the excess of the total expense over 5% of the net income without the benefit of this deduction, allowable deduction for medical expense is reduced from $134.65 to $59.65, disallowance being made of the difference of $75.00.

Recomputation follows:

IT:AUDIT:FEM:EHS
1943—355980

Wm. I. Connelly &
Mrs. Bertha Connelly

Net Income shown on return		$5688.38
Plus: Excluded in error		1500.00
Disallowance		75.00
Income tax net income adjusted		$7263.38
Less: Personal exemption	$1200.00	
Credit for dependents	700.00	1900.00
Balance subject to surtax		$5363.38
Less: Earned income credit		726.34
Balance subject to normal tax		$4637.04
Normal Tax		$278.22
Surtax		852.68
Income tax for 1943		$1130.90
Victory tax net income shown on return		$6509.83
Plus: Excluded in error		1500.00

Victory tax net income adjusted		$8000.83
Less: Specific exemption		1248.00
Balance subject to victory tax		$6761.83
Victory tax before credit	$338.09	
Less: Victory tax credit (44%)	148.76	
Net victory tax		$189.33
Plus income tax for 1943 (brought forward)		1130.90
Total income and victory tax for 1943		$1320.23

Since this amount is larger than your 1942 tax of $536.91, the total liability is the sum of the 1943 tax and one fourth of the 1942 tax.

1943 tax		$1320.23
Plus: 1/4 of $536.91		134.23
Total tax		$1454.46
Less: Tax withheld	$740.23	
Tax paid on 1942 income	134.23	
Payment on Declaration of Estimated Tax	none	$874.46
Balance of tax		$580.00
Less: Tax previously assesed		146.41
Increase		$433.59

Remittance for this amount plus interest at 6% per annum from 3 15 44 to date of payment should be forwarded for attention file symbols this letter.

Yours very truly,

N. B. Early, Jr.
Collector

9 Copy

January 31, 1946

IT:AUDIT:FEM:EHS
1944——7161500

William I. Connelly, Commander, USCGR &
Mrs. Bertha Connelly
531 West Great Falls Street
Falls Church, Virginia

Dear Commander and Mrs. Connelly:

Reference is made to your 1944 income tax return on which refund of $715.60 is claimed.

Examination of the return discloses that you have excluded from gross income $1500.00, special allowance granted members of the armed forces for active service and $2171.10 equivalent of rental and subsistence allowances to members of the armed forces.

Your return with several others was transmitted to the Bureau of Internal Revenue for a specific ruling with respect to your status since the Bureau had ruled that generally "where an individual enrolls for active service without pay or allowances other than military allowances and receives pay from civilian sources or from a civilian government payroll, such compensation is regarded as not being remuneration for services as a member of the military or naval forces of the United States for active service in such forces within the intendment of section 22(b)(13) of the Internal Revenue Code, as amended. Accordingly he may not exclude from gross income $1500.00 of his civilian pay. Any allowances for quarters, subsistence, uniform, etc., actually received by him from the Coast Guard by reason of his active service therein should be excluded from gross income for Federal income tax purposes.

With respect to Commander Connelly specifically, the Bureau states that it has been advised by the Navy Department to the effect that he served in a civil status and received civil service civilian pay and that he did not re-

ceive from the Navy either cash or other allowances for rental or subsistence.

Since Commander Connelly is in civilian status he is not eligible for the special benefits allowable to members of the armed forces for active service and his entire compensation as a temporary member of the Coast Guard Reserve is taxable.

10 IT:AUDIT:FEM:EHS

1944——

Computation of tax follows:

Compensation from Coast Guard (W.I.C.)		$5802.08
Compensation form Bureau of Standards (B.C.)		2190.01
Total income		$7992.09
Less: Standard Deduction		500.00
Net income		$7492.09
Less: Surtax exemption		2000.00
Balance subject to surtax		$5492.09
Surtax ——		$1227.94
Net income	$7492.09	
Less: Normal tax exemption	1000.00	
Balance subject to normal tax	6492.09	
Normal tax		194.76
Total Tax		$1422.70
Less: Tax withheld		1195.60
Increase		$433.59

Remittance for this amount plus interest at 6% per annum from 3-15-45 to date of payment should be forwarded for attention files symbols this letter.

Yours very truly,

N. B. EARLY, JR.
Collector

* * * * * * * * * *

11 Apr 24 1945

Answer.

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits that petitioners are husband and wife; that they are residents of Falls Church, Virginia, and that their income tax returns for the years 1943 and 1944, here involved, were filed with the Collector of Internal Revenue for the District of Virginia.

2. Admits that a statutory notice of deficiency was mailed to the petitioners on February 26, 1946, and that a copy thereof is attached to the petition.

3. Admits that the taxes in controversy are Federal income taxes for the years 1943 and 1944 in the amounts of $433.59 and $227.10 respectively.

4. Denies that the Commissioner's determination of the petitioners' liability for income tax for the years 1943 and 1944, as set forth in the statutory notice of deficiency, is erroneous, and further denies that the Commissioner erred as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

12 5(a) Admits that petitioner William I. Connelly was a temporary member of the United States Coast Guard Reserve during the years 1943 and 1944 and that he received no pay therefor other than the compensation of the civilian position which he held with the United States

Coast Guard on the date he was commissioned as a temporary member thereof. Denies each and every remaining allegation contained in subparagraph (a) of paragraph 5 of the petition.

5 (b) and (c). Denies each and every allegation contained in subparagraphs (b) and (c) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified as denied.

Wherefore, it is prayed that petitioners' appeal be denied.

J. P. Wenchel (PAB)
J. P. WENCHEL
Chief Counsel
Bureau of Internal Revenue

Of Counsel

PHILIP A. BAYER
Division Counsel.

G. J. LEBLANC
Special Attorney
Bureau of Internal Revenue

13 Filed at Hearing Oct 28, 1946

Stipulation of Facts.

It is hereby stipulated, by and between the parties hereto that the following statements may be accepted as facts, without prejudice to the right of either party to introduce additional evidence not inconsistent herewith.

1. The petitioners are husband and wife residing at 531 West Great Falls Street, Falls Church, Virginia. The returns for the periods here involved were filed with the Collector for the District of Virginia.

2. The notice of deficiency, a true and correct copy of which is annexed to the petition, was mailed to the petitioners on February 26, 1946.

3. The taxes in controversy are income taxes for the calendar years 1943 and 1944.

4. For many years prior to February 19, 1943, the petitioner, William I. Connelly, was a civil service employee of the United States. On March 1, 1942, he became an employee of the United States Coast Guard under the provisions of a reorganization executive order (E. O. 9083), in the capacity of senior attorney, grade P-5, and thereafter performed legal duties in the capacity of Chief, Admiralty and Maritime Section, Legal Division, Coast Guard Headquarters.

5. On February 19, 1943, he was enrolled under Section 307 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended by the Act of November 23, 1942, Public No. 773, 77th Congress, 2d Session (U. S. C. Title 14, Sec. 307), as a temporary member of the Coast Guard Reserve, and immediately ordered to full-time active special duty at Coast Guard Headquarters, Washington, D. C. The petitioner was enrolled in the rank of lieutenant commander, and thereafter during the period of his enrollment continued to receive for his services and the duties assigned to him compensation from Congressional appropriations allocated to pay for civilian positions. The duration of his enrollment was from February 19, 1943 to September 15, 1945. Deductions for civil service retirement were continued, and he was still governed by civil service regulations for annual and sick leave, and received overtime pay in excess of 40 hours per week. A true and correct copy of the said enrollment, acceptance, oath of office, and order to active duty (one document) is annexed hereto, made a part hereof and marked Exhibit 1-A.

6. On April 21, 1944, the petitioner's civil service position was reclassified from grade P-5 to grade P-6, effective March 16, 1944. On April 24, 1944, the petitioner was dis-

enrolled as lieutenant commander, effective as of March 15, 1944, re-enrolled in the rank of commander, Class T, Coast Guard Reserve, effective as of March 16, 1944, and again immediately ordered to full time active duty at Coast
15 Guard Headquarters. True and correct copies of a memorandum dated April 21, 1944 from the chief, Civilian Personnel Division to the Chief, Temporary Reserve Division, the disenrollment, report of change in personnel, the re-enrollment, acceptance, oath of office and order to active duty (four documents) are annexed hereto, made a part hereof and marked Exhibits 2-B, 3-C, 4-D and 5-E.

7. On September 15, 1945, the petitioner was disenrolled commander, Class T, Coast Guard Reserve. True and correct copies of the original disenrollment, a memorandum dated September 22, 1945 from the petitioner to the Commandant of the Coast, Guard, and a further disenrollment are annexed hereto, made a part hereof and marked Exhibits 6-F, 7-G, and 8-H.

8. There is only one Coast Guard ~~Reserve and~~ it is composed of regular and temporary members.

9. In their income tax returns for the years 1943 and 1944 the petitioners claimed as an exclusion from the income of the petitioner, William I. Connelly, for those years the annual allowance of $1,500 provided by law for military and naval personnel, which was disallowed by the respondent; and 1944 they claimed an additional exclusion of $2,171.10 as allowances for quarters and subsistence, which was also disallowed by the respondent.

10. In addition, in their return for 1943, the petitioners claimed that their medical expenses for that year exceeded 5% of their net income for the period by $134.65. The respondent disallowed $75 of that amount asserting that the amounts restored to income by the disallowances
16 aforesaid required that disallowance also. If the amounts were properly restored to income, then the disallowance of this item is also proper, but if the said

amounts were improperly restored to income, the disallowance of this item is also improper.

/s/ WILLIAM E. KOKEN
Attorney for Petitioner

/s/ J. P. WENCHEL
Chief Counsel
Bureau of Internal Revenue

17 **Exhibit 1-A.**

[Seal] Address the Commandant,
U. S. Coast Guard
and Refer to No.

UNITED STATES COAST GUARD
Washington
19 February, 1943.

From: Commandant,
To: William I. Connelly

Subject: Enrollment in Coast Guard Reserve as temporary member (Class T) and assignment to active duty.

References: (a) Section 207, Coast Guard Auxiliary and Reserve Act of 1941, as amended.
(b) Coast Guard Reserve Regulations, as amended.
(c) Personnel Bulletin No. 3-43, 11 January, 1943.
(d) Form No. 2748 for Acceptance and Oath of Office or Oath of Allegiance.

1. In accordance with references (a), (b) and (c), you are hereby enrolled as a temporary member of the Coast Guard Reserve for the duration of the war as Lieutenant Commander (rank or rating).

2. Subject to your acceptance and taking the prescribed oath of office, or oath of allegiance, as the case may be, you are, pursuant to references (a), (b) and (c), hereby ordered to full-time active special duty at Coast Guard Headquarters without pay other than the compensation of your civilian position.

3. While on active duty, you are vested with all the rights, privileges, powers and duties of a regular member of the Coast Guard Reserve of the same rank or rating, and you are subject to all laws and regulations for the government of the Coast Guard and its Reserve. You are not exempt from liability for training and service under the Selective Training and Service Act of 1940, as amended.

4. Your duties while on active duty will be as directed by the Commandant.

5. Such uniforms as may be required and prescribed will be furnished you.

A. G. Mossell,
By direction.

18 N. C. G. 2748
U. S. Coast Guard

Acceptance

Washington, D. C.
19 February 1943

To the Commandant of the Coast Guard:

Sir:

I hereby accept enrollment as Lieutenant Commander (temporary) in the Coast Guard Reserve, dated 19 February, 1943, to rank or rate as such from , 19 .

I hereby agree to perform active duty under this enrollment without pay or allowances, other than subsistence in kind or commutation thereof, and an allowance for uniforms. (This paragraph should be stricken out if the enrollee does not agree to serve without pay and allowances.)

Respectfully,

William I. Connelly
U. S. Coast Guard Reserve (temporary)

Oath of Office (for Officers)

To the Commandant of the Coast Guard:

Having been enrolled Lieutenant Commander (temporary), in the U. S. Coast Guard Reserve, I, William I. Connelly, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So Help Me God.

And I do further swear (or affirm) that I will use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports. So Help Me God.

WILLIAM I. CONNELLY
U. S. Coast Guard Reserve (temporary)

Subscribed and sworn to before me this day of 19 .

K. S. HARRISON

. . . . . .

20

Exhibit 3-C.

UNITED STATES COAST GUARD
Washington 25, D. C.

Address Reply to
The Commandant (PPP)
Refer to File: CG-781
24 April, 1944

To: Lieutenant Commander (T) William I. Connelly, USCGR

Subj: Disenrollment, Class T, USCGR; re-enrollment as Commander, Class T, USCGR

You are hereby disenrolled from your present status as a Lieutenant Commander, Class T, USCGR, in order that

you may be re-enrolled as a Commander, Class T, USCGR. This disenrollment is effective as of 15 March, 1944.

I. B. STEELE
By direction

* * * * * * * * *

22 **Exhibit 5-E.**

Temporary Member of Coast Guard Reserve
Enrollment and Active Duty Assignment
From Office of District Coast Guard Officer:

Naval District U. S. Coast Guard Headquarters City Washington, D. C. State Date 24 April, 1944

To: William I. Connelly Rank or Rating Commander

1. In accordance with the provisions of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, and Coast Guard Reserve Regulations as amended, and subject to your acceptance and execution of the prescribed oath of office or oath of allegiance, you are hereby enrolled as a temporary member of the United States Coast Guard Reserve, with the rank or rating indicated above, USCGR, Class T, from 16 March, 1944.

2. The period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority.

3. You will perform such duties as may be prescribed from time to time by Coast Guard authority in the classification checked below:

1. ( ) Auxiliary members enrolled in Class T.
2. ( ) Volunteer Port Security Force.
3. ( ) Enrolled for other volunteer duty, namely ———.
4. ( ) Pilots.
5. (x) Coast Guard Civil Service Employees.
6. ( ) Officers of Great Lakes Vessels.

You are authorized to wear the prescribed uniform only while on active duty and while enroute to and from such

duty. Members in Classifications 1, 2, and 3 will be on active duty only as directed by competent authority for a minimum of 12 hours per week. They will not be subject to transfer without their consent. Members in Classifications 4 and 5 will be on active duty and subject to call at all times. Members in Classification 6 will be on active duty only during the open season of navigation on the Great Lakes.

4. Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or enroute to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade or rating. You shall be subject to the laws, regulations and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended.

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Government employees) except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of: None.

6. You are not by reason of enrollment as a temporary member of the Reserve exempt from registration and liability for training and service under the Selective Training and Service Act.

7. You will be entitled to the following benefits and privileges only: (a) in the case of physical injury incline of duty while performing active Coast Guard service, or death as a result of such physical injury, the benefits prescribed by law for civil employees of the United States, as administered by the United States Employees' Compensation Commission, to the extent that the same may be applicable. (b) In the case of sickness or disease contracted while performing active duty, the same hospital (including medical but exclud-

ing dental) treatment as is afforded members of the regular Coast Guard. (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations.

8. You are hereby ordered, upon acceptance of this enrollment and execution of the prescribed oath, to commence active duty at: Legal Division at U. S. Coast Guard Headquarters, in accordance with the above terms and conditions, effective 24 April, 1944.

Accepted William I. Connelly Date 24 April, 1944

Enrolling Official (By Direction of the Commandant I. B. Steele, Commander, USCG.

Oath of Office (For Officers)

Having been enrolled as Commander (temporary) in the United States Coast Guard Reserve, I, William I. Connelly, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So Help Me God. And I do further swear (or affirm) that I will use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports. So Help Me God.

WILLIAM I. CONNELLY
Comdr. (T), USCGR

Subscribed and Sworn to before me this 24 day of April, 1944.

I. B. STEELE
Commander, USCG

Oath of Allegiance (For Enlisted Men)

Having been enrolled as (temporary)

in the United States Coast Guard Reserve, I,

, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the laws and regulations for the government of the United States Coast Guard.

United States Coast Guard Reserve (Temporary)

(Signature and Title)

Subscribed and sworn to before me this day of

, 19 .

. . . . . .

Excerpts from Testimony and Proceedings.

28 The Tax Court of the United States.

. . . . . .

Court Room No. 2,
Bureau of Internal Revenue,
Washington, D. C.
Monday, October 28, 1946—11:30 a.m.

(Met pursuant to notice.)

Before:

Hon. J. Russell Leech, Judge.

Appearances:

Wm. E. Koken, Esq., 1508 H St., N.W., Washington, D. C., appearing for the petitioner.

O. M. Wolff, Esq., (Hon. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), for the respondent.

. . . . . .

29 PROCEEDINGS.

34 **William I. Connelly**

Direct examination
By Mr. Koken:

35 Q. Will you give the Court a brief sketch of your service with the Government of the United States? A. I first entered the service of the United States in 1918 with the Construction division of the Army, transferring from there into the Shipping Board where I remained at Washington and in New Orleans from 1919 until 1940, thereafter entering the Office of the Solicitor of the Department of Commerce in Washington, where I remained until the first of March 1942.

On that date, by Executive Order 9083, the functions of the Bureau of Marine Inspection and Navigation were transferred from the Department of Commerce to the Coast Guard. As my duties in the Office of the Solicitor were directly involved with the functions of the Bureau and as the personnel of the Bureau were transferred to the Coast Guard, I was transferred to the Coast Guard.

My work with the Department of Commerce had been specialized and I was retained by the Coast Guard and in the Legal Division of the Coast Guard on that specialty until the 19th of February, 1943.

Q. What happened on that date? A. That afternoon at five o'clock I was sworn in—took the oath of office as an officer of the Coast Guard, with the rank of Lieutenant Commander as a temporary member of the Coast Guard Reserve.

36 Q. Would you explain the circumstances surrounding that appointment, briefly? A. An invitation had been offered me before for persons in so-called key positions to accept commissions with the Coast Guard. At that time I felt that my qualifications in the service might be of some

service to the Coast Guard, and I applied for a commission. Because of my age and the specialized characteristics of the work which I had been performing, I was informed that I was not eligible for general sea duty and they were already receiving too many specialists to justify the issuance of a straight Coast Guard Commission.

Thereafter in January of 1943 I received a letter addressed to me personally suggesting that I accept an appointment or an enrollment as a temporary member of the Coast Guard Reserve. I relegated that to the waste basket, because I was not interested, and later on I was informed that it might be to my best interest if I accepted and performed the duties thereof.

Those are the circumstances under which I entered the Coast Guard Reserve.

Q. Immediately after enrollment, what was your understanding as to the nature of your status because of the enrollment? A. Because of the representations that had been made, in writing or orally, I saw no reason for drawing a conclusion that there was any difference between my status as an officer in the Coast Guard Reserve and any other person who had graduated from the Coast Guard Academy or who had been brought into the Coast Guard Reserve during the war emergency. In other words, I thought that I was an officer of the Coast Guard Reserve without qualifications—without any restrictions or limitations.

Q. Did you have any idea that your duties after enrollment were to be any different than prior to it? A. No, sir.

Q. Did you have any understanding that your duties after enrollment were to be military? A. After that enrollment I definitely thought I was performing military functions and military duty.

Q. Were you required to obtain and wear a military uniform during the term of your enrollment? A. I was.

Q. Under what circumstances? A. My orders stated I should obtain the uniform that was defined by the regula-

tions, and I was told that I would receive the customary $250 military clothing allowance which was issued to officers in the Coast Guard and the Reserve. Thereafter I was informed that some part of the clothing which I would
38 wear would be issued out of the stockroom at Coast Guard Headquarters, but they discovered that the influx of other commissioned officers had depleted that stock and it was finally arranged for them to give me a purchase order on Livington's Clothing Store up on Seventh Street where I went and obtained two blue uniforms, two khaki uniforms and a white uniform and some of the appurtenances.

Later it was decided that the difference between that which had been expended and the $250 would be paid to me in cash, and I received, finally, the full value of the $250 clothing allowance.

Q. It is common knowledge, is it not, among military personnel that newly commissioned officers are entitled to a uniform allowance of $250? A. Yes.

Q. After you took the oath of office as a temporary reservist, how was your life as a civilian affected? A. Well, before I took the oath of office I was required to report for duty in the morning at eight o'clock and at 4:30 in the evening I was through, if I so chose. After I took the oath of office I learned that I was under the complete control and authority of the Coast Guard for 24 hours a day, that my orders so stipulated.

I would require a written permission from my commanding officer before I could leave the base and go to a distance of more than 50 miles, without being exposed
39 to the risk of arrest by the shore patrol or other authority.

If I happened to have two or more guests at my home I was required to don the regulation uniform and wear it at all times, and by that I mean that the regulation uniform as worn in my home had to conform in all respects to the regulations. Nothing of informality was attached to that wearing of the uniform.

I was required to exchange the customary courtesies of salute when the salute was tendered to me or when, under certain circumstances I should initiate it as being the junior officer.

If by any chance I was indisposed, could not report to duty, instead of calling up my secretary and having her put me on the sick list, I had to report through the duty officer of the Coast Guard, and that duty officer would make the necessary report not only to my commanding officer and the chief counsel, but also any other reports that were necessary to be made.

Q. In other words, there was a direct impact of considerable consequence on your civilian life? A. There was a direct impact in the sense that in any transgressions I might indulge I was subject to all the Navy regulations as respects discipline, and that could, under appropriate circumstances, amount to a general Court Martial.

Q. And were you addressed as "Commander," as
40 were other officers of your status? A. Yes.

* * * * * * * * * *

42 Q. Why, may I ask, do you retain the uniform?

A. There are two purposes. The first is that under Coast Guard authority on occasions of state or military importance I am entitled to wear the uniform; and the second reason, rather remote, I hope, is the authorization which has been given, or rather the directions have been given to the Coast Guard temporary members that they are entitled to be interred in the National Cemetery, and I expect to wear at least this coat on that occasion.

Q. Will you inform the Court of the significance of the ribbons that are attached to the uniform jacket? A. Those ribbons are campaign ribbons which have been authorized by the Secretary of the Navy, accepted y the Commandant of the Coast Guard under Executive Order permitting the issuance of ribbons at least temporarily for the medals that will be eventually worn by the recipients of these ribbons under certain prescribed conditions.

Q. Did you receive authorization to wear those ribbons? A. Yes, sir.

. . . . . .

43 Q. Commander, is it your understanding it was necessary for a person to have been a member of the Armed Forces of the war just ended to entitle that person to wear the ribbons? A. I so understand.

. . . . . .

45 Q. As a reserve officer were you authorized to use the postal franking privilege? A. Not only could but did so.

Q. Was that privilege accorded to civil employees in the service of the United States? A. No, sir.

Q. Were you also authorized to purchase from ship's stores in the Quartermaster Corps and Coast Guard? A. I was.

Q. Was that privilege accorded to the civil service employees in the United States? A. No, it was not.

Q. Did you become a member of what is called the Coast Guard Wine Mess? A. I did.

Q. Is that privilege available to civilian civil service employees of the United States? A. It was not.

Q. Were you permitted to use military and naval messes and cafeterias? A. Yes.

Q. Was that extended to civil service employees of the United States? A. Only on rare occasions when the civil servant was invited as a guest of an officer. It is my
46 understanding that the officers could take a civilian into the Coast Guard cafeteria or mess—it was twice a month, two times a month, but that same restriction applied to the officers' dependents as well.

Q. That is as a guest? A. As a guest.

Q. Did you or did you not receive a ration card issued by the Navy Department to its military personnel? A. I did.

Q. For the purpose of purchasing tobacco from the ship's store? A. I did.

Q. Were those cards issued to any civilian personnel that you know of? A. They are issued to civilian personnel if the civilian personnel were the wife or dependent of the military person, but they were distinguished. The military person received the military card and the dependent received a civilian card.

Q. Did you or did you not have access to or use the medical facilities in the Navy Department or the United States Public Health Service? A. I did.

Q. Was this privilege extended to civil employees
47 of the United States? A. No.

Q. Did you or did you not receive any dental attention while in the service? A. I did not receive any, although I was entitled to it.

Q. Was that privilege available to civil service employees? A. I understand not.

Q. Did you or did you not receive any optical service or medical attention while you were in the service? A. One time for each.

Q. Was that benefit available to the civil service employees of the United States? A. I understand not.

Q. Were you entitled to the use of the war ballot which was available only to the members of the Armed Forces while you were absent from your state of domicile? A. Yes, it was so held that I was.

Q. And what is your state of domicile? A. Louisiana.

Mr. Koken: I believe that is all.

* * * * * * * * * *

63 **Petitioner's Exhibit 6**

United States Coast Guard

Washington

Address Reply to
The Commandant (F)

24 July, 1943

Office Memorandum No. 13-43

Subj: Military status of temporary members of the Coast Guard Reserve; military authority, customs, and procedures applicable to temporary members of the Coast Guard Reserve in the execution of their duties under their temporary enrollment.

1. It has come to the attention of the Commandant that there exists considerable confusion as to the military status of temporary members of the Reserve, with particular reference to civil service employees who have been enrolled as temporary members of the Reserve, in regard to the military authority to be exercised by them, their use of military titles and procedure, and the applicability to temporary members of the Reserve of military regulations, customs and practices.

2. It is desired to impress upon all heads of offices, chiefs of divisions, and all regular and Reserve personnel that while engaged on active duty, as set forth and described in his certificate of temporary enrollment, a temporary member of the Reserve has the same power, authority, rights and privilges as members of the regular Coast Guard of similar rank, grade, or rating in the execution of the duty assigned to him. Accordingly, a temporary member of the Reserve, regardless of whether or not under the law he retains his civil service status or is temporarily enrolled under other conditions, exercises, during the periods of active duty set forth in his certificate of temporary enrollment, the same military authority and assumes the same military responsibility in the execution of his assigned tasks as a member of the regular Coast Guard or of the regular Reserve of the same rank, grade, or rating. A temporary member of the Reserve is, therefore, entitled to the same military courtesy and privileges, and is governed by the same military procedures and practices as regular personnel and to the same extent.

3. The Commandant desires to make it crystal clear that there is a definite distinction between the military status and activities of a temporary member of the Reserve and the determination of the benefits—particularly with regard to pecuniary benefits—that derive to such temporary members in the Coast Guard Reserve. This question of benefits, particularly financial benefits, of temporary members of the Reserve is not involved in this memorandum whatsoever, and nothing in this memorandum shall be so construed.

64 4. It is directed that hereafter temporary members of the Reserve will, in the execution of their official duties at Coast Guard Headquarters, occupy the same place in the scheme of Headquarters organization as members of the regular Coast Guard and the regular Reserve. They shall exercise military authority and accept military responsibility within the scope of their active duty functions, in accordance with the terms of their temporary enrollment, with regard to conditions of service, authority, powers, duties, periods of active duty, etc.

5. Temporary members of the Reserve will be expected to observe military customs, practices, and etiquette, and in turn will be accorded military courtesies in accordance with their rank, grade, or rating. Temporary members of the Reserve will be included in all training programs, lectures, etc. in the same manner and on the same basis as other members of the Coast Guard Reserve assigned to Coast Guard Headquarters. Their military title shall be used when applicable and in the same manner as military titles of regular military personnel. In short, temporary members of the Reserve, in the exercise of the duty for which enrolled and during the period of the exercise of such duty as set forth in the certificate of temporary enrollment, are on exactly the same basis as other members of the Reserve with regard to the exercise of military authority and the acceptance of military responsibility; and all military procedures, practices, customs, and etiquette shall be ap-

plicable to such temporary members except where specifically exempted by orders of the Commandant.

6. The attention of heads of offices and chiefs of divisions is invited to the fact that one of the principal reasons for the induction of civil service employees into the military establishment as temporary members of the Reserve was to obtain a homogeneous organization on a military basis and to eliminate differences in procedure and practices applicable to military personnel and civil service personnel engaged on exactly the same duty; and this memorandum is issued in order to effectuate that policy.

7. It is desired to reiterate that nothing contained in this memorandum has any bearing on the benefits accruing to a temporary member of the Reserve by reason of the military status acquired by temporary membership in the Coast Guard Reserve as set forth herein.

R. R. WAESCHE,
Commandant.

CG Distribution:
Headquarters only

* * * * * * * * * *

Findings of Fact and Opinion.

79 Docket No. 10372. Promulgated April 21, 1947.

In the taxable years 1943 and 1944, petitioner, William I. Connelly, a government employee holding a classified civil service position, was enrolled as a temporary member of the Coast Guard Reserve with a rank or rating of Lieutenant Commander and later, Commander. The certificate under which he was enrolled stated he was to serve without pay and allowances other than the compensation of his civilian position. Held: (a) Petitioner was not a commissioned officer of the Coast Guard Reserve entitling him to a tax exclusion of $1,500 in the respective taxable years, within the purview of section 23 (b)(13), I. R. C., as amended by the Revenue Act of 1945; and (b) Petitioner

is not entitled to deduct the sum of $2,171.10 in the taxable year 1944 as allowance for subsistence and quarters.

Medical expenses in excess of five per cent of net income claimed are properly adjusted on restoration to gross income of the disallowed exclusions.

80 William E. Koken, Esq., for the petitioners.

E. M. Woolf, Esq., for the respondent.

This proceeding involves income tax deficiencies for the taxable years 1943 and 1944 in the respective amounts of $433.59 and $227.10. The issues are: (1) Whether petitioner, William I. Connelly, is entitled to exclude from income received from the United States Coast Guard the amount of $1,500 for each of the taxable years 1943 and 1944 under the provisions of section 22 (b)(13) of the Internal Revenue Code; and (2) whether said petitioner is entitled to deduct from income received from the United States Coast Guard for the taxable year 1944 the amount of $2,171.10, which represents the allowance for quarters and subsistence of a regular commissioned officer in the United States Coast Guard Reserve.

The case was submitted on a partial stipulation of facts, oral stipulations, oral testimony and exhibits. We incorporate as findings, all the stipulated facts. Facts found which were not stipulated are found from the evidence.

FINDINGS OF FACT.

The petitioners are husband and wife and reside at 531 West Great Falls Street, Falls Church, Virginia. Their returns for the taxable years involved were filed with the collector of internal revenue for the district of Virginia. For many years prior to February 19, 1943, petitioner, William I. Connelly (hereinafter referred to as "petitioner"), was a civil service employee of the United States. On March 1, 1942, petitioner became an employee of the United States Coast Guard under the provisions of a

81 reorganization executive order (E.O. 9083) in the capacity of senior attorney, grade P-5, and there-

after performed legal duties in the capacity of chief, admiralty and maritime section, legal division, Coast Guard Headquarters. On February 19, 1943, under section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended by the Act of November 23, 1942 (U.S.C. Title 14, sec. 307), petitioner was enrolled as a temporary member of the Coast Guard Reserve for the duration of the war with the rank of Lieutenant Commander. He was ordered to full time active special duty at Coast Guard Headquarters without pay other than the compensation of his civilian position. While on active duty, petitioner was vested with all the rights, privileges, powers and duties of a regular member of the Coast Guard Reserve of the same rank, and was subject to all laws and regulations for the government of the Coast Guard and its Reserve. Petitioner was not exempt from liability for training and service under the Selective Training and Service Act of 1940, as amended. During the period of his enrollment petitioner continued to receive for his services and the duties assigned to him compensation from Congressional appropriations allocated to pay for civilian positions. Deductions for civil service retirement were continued and petitioner was still governed by civil service regulations for annual and sick leave and received overtime pay in excess of 40 hours per week. The memorandum of enrollment, dated February 19, 1943, was from the Commandant of the Coast Guard to petitioner and was signed by "A. G. Morrill, By direction".

82 On April 21, 1944, petitioner's civil service position was reclassified from grade 5 to grade 6, effective March 16, 1944. It was recommended by Chief Counsel, United States Coast Guard, to Chief, Temporary Reserve Division, that petitioner be promoted to the rank of Commander (Class T), to rank as such from March 16, 1944, which action would be in accordance with the two conditions set forth in the Commandant's Memorandum of March 10, 1944, pertaining to the promotion of members of the temporary Reserve Headquarters, who are also civilian

employees. On April 24, 1944, petitioner was disenrolled as Lieutenant Commander (Class T), effective as of March 15, 1944, and re-enrolled in the rank of Commander (Class T), Coast Guard Reserve, effective as of March 16, 1944.

The certificate headed "Temporary Member of Coast Guard Reserve Enrollment and Active Duty Assigned", *inter alia*, stated:

2. The period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority.

3. You will perform such duties as may be prescribed from time to time by Coast Guard authority in the classification checked below:

* * * * * * * * *

5. (x) Coast Guard Civil Service Employees.

* * * * * * * * *

You are authorized to wear the prescribed uniform only while on active duty and while enroute to and from such duty. * * * Members in Classifications 4 and 5 will be on active duty and subject to call at all times. * * *

4. Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you
83 are actually engaged on active duty or enroute to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade or rating. You shall be subject to the laws, regulations and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended.

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Gov-

ernment employees), except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of:

Note.

6. You are not by reason of enrollment as a temporary member of the Reserve exempt from registration and liability for training and service under the Selective Training and Service Act.

7. You will be entitled to the following benefits and privileges only: (a) In the case of physical injury in line of duty while performing active Coast Guard service, or death as a result of such physical injury, the benefits prescribed by law for civil employees of the United States, as administered by the United States Employees' Compensation Commission, to the extent that the same may be applicable. (b) In the case of sickness or disease contracted while performing active duty, the same hospital (including medical but excluding dental) treatment as is afforded members of the regular Coast Guard. (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations.

8. You are hereby ordered, upon acceptance of this enrollment and execution of the prescribed oath, to commence active duty at Legal Division at U. S. Coast Guard Headquarters in accordance with the above terms and conditions, effective 24 April, 1944.

On September 15, 1945, petitioner was disenrolled as a temporary member of the Coast Guard Reserve. The original disenrollment form issued by Coast Guard Headquarters to petitioner stated the reason for disenrollment was "For his own convenience" and that the type of service was "Coast Guard Civil Service Employee, without military pay". Petitioner filed a written protest specifically objecting to the description of "Record of Service". Later another disenrollment was issued to petitioner stating the reason for disenrollment was "com-

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pletion of service because of satisfactory completion of assigned duties". The type of duty performed was "Chief of Admiralty and Maritime Section having civil service status, receiving civilian but no military pay, and holding rank of Commander as a Temporary Member of the Coast Guard Reserve". There is only one Coast Guard Reserve and it is composed of regular and temporary members. Petitioner received total civilian pay from the Coast Guard for the year 1943 in the amount of $5,872.04 and for the year 1944, the amount of $5,802.08.

In their income tax returns for the years 1943 and 1944, the petitioners claimed as an exclusion from the income of petitioner William I. Connelly, the annual allowance of $1,500 provided by law for military and navy personnel, which was disallowed by the respondent; and for the year 1944, they claimed an additional exclusion of $2,171.10 as allowance for quarters and subsistence, which the respondent also disallowed.

In their 1943 return petitioners claimed that their medical expenses for that year exceeded five per cent of the net income for the period by $134.65. The respondent disallowed $75 of that amount, asserting that the amounts restored to income by the disallowances aforesaid required that disallowance also. It was stipulated that if the amounts were properly restored to income then the disallowance of $75 is proper; but if said amounts were improperly restored to income the disallowances of this item is improper.

85

OPINION.

LEECH, Judge: The primary issue is whether the respondent correctly determined that petitioner is not entitled to the exclusion of $1,500 in each of the taxable years under the provisions of section 22 (b)(13)(A) of the Internal Revenue Code, as amended by section 141 (a) of the Revenue Act of 1945. By section (b) of that act subsection (A) is made applicable to taxable years beginning after Decem-

ber 31, 1942, and (B) is made applicable to the years beginning after December 31, 1940.[1]

The argument of the petitioner is almost entirely devoted to attempting to prove that he was "in the military or naval forces of the United States during the war". We think the issue is much narrower. Unless the petitioner is a commissioned officer (or commissioned warrant officer)" in such forces, he is clearly not entitled to the benefits of such section. Congress has limited the $1,500 exclusion to persons rendering active service in the military and naval forces who meet the well defined specified classes. Statutes granting tax exemptions must be strictly construed in favor of the government. Bank of Commerce v. State of Tennessee, 161 U.S. 134. Petitioner's own testimony rather conclusively establishes that he was not a commissioned officer in the Coast Guard Reserve. On cross-examination he testified as follows:

"Q. I believe you stated that you applied for a commission in the United States Coast Guard Reserve.

A. That is right.

"Q. Prior to being enrolled?

"A. That is right.

"Q. And you were not commissioned in the United States Coast Guard Reserve?

"A. I never received a commission from the Coast Guard as a commission is commonly classified. I did receive this

[1] SEC. 141. ADDITIONAL ALLOWANCE FOR MILITARY AND NAVAL PERSONNEL.

(a) In General.—Section 22 (b)(13) (relating to the exclusion from gross income for military and naval personnel) is amended to read as follows:

"(13) Additional Allowance for Military and Naval Personnel.—

"(A) In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war, or, in the case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, so much of such compensation as does not exceed $1,500.

"(B) Compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a member below the grade of commissioned officer (or commissioned warrant officer) in the military or naval forces of the United States during such war".

so called certificate of enrollment which I was led to believe was the substitute for the commission".

Petitioner was enrolled as a temporary member of the Coast Guard Reserve without military pay. Provision for such enrollment was authorized by Act of Congress. See Chap. 9, Title 14, Section 307, United States Code Annotated.[2] The House Report recommending the Bill 87 (56 Stat. 1020) clearly shows that its purpose was to permit enrollment of Government employees without military pay, and to give them temporary rank or ratings and necessary military authority and responsibility.[3]

[2] The Commandant * * * is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe * * * such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, * * * to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades and ratings as are provided for the personnel of the regular Coast Guard Reserve.

[3] H. R. No. 2525, 77th Cong., 2nd Sess., (1942), in part, states:

The act of June 6, 1942 (Public Law 599, 77th Cong.), amended section 207 of the Coast Guard Auxiliary and Reserve Act of 1941 so as to authorize the enrollment of especially qualified men as temporary members of the Coast Guard Reserve for full time, intermittent, or part time duty without pay. Under this authority men in all walks of life have been enrolled in the Coast Guard Reserve and perform special duty with military authority and responsibility in addition to carrying on their regular vocations. * * *

* * * * *

Under the authority now contained in the Coast Guard Auxiliary and Reserve Act as outlined above, it is believed that Government employees may be enrolled as temporary members of the Coast Guard Reserve without pay on the same basis as persons of other civilian status, but your committee deems it advisable to clarify this authority and resolve any doubt of its applicability to Government employees by specifically providing for temporary membership in the Coast Guard Reserve of Government employees without military pay but with continuance in their civilian positions and the receipt of the compensation thereof. It should be pointed out that the conferring of temporary ranks or ratings upon such persons will not exempt them from liability for training and service under the Selective Training and Service Act of 1940, as amended. It will, however, give to such employees necessary military authority and responsibility during their temporary membership in the Coast Guard Reserve.

* * * * * *

This amendment is proposed and recommended by your committee since it would solve this administrative problem by resolving any possible doubt of the authority of the Coast Guard to enroll certain Government employees as temporary members of the Reserve for active Coast Guard duty without the pay of their military rank or rating, and would obviate any possible impairment of the right of such employees to continue to receive the compensation of their civilian positions for the entire period of their performance of active Coast Guard duty as such temporary members. There will be little, if any, change in the nature of their duties after enrollment.

88 Civil service employees enrolled as temporary members of the Coast Guard Reserve were still governed by civil service regulations for annual and sick leave; deductions from pay under the Civil Service Retirement Act were continued and they received overtime pay in excess of 40 hours per week. The fact that petitioner was permitted to enjoy certain privileges accorded to personnel having a military status is of no controlling significance. Unless he was a commissioned officer, we think he was not entitled to the tax exemption benefit provided for in section 22 (b)(13)(A) and (B) of the Code, as amended. Commissioned officers of the Coast Guard are appointed by the President.[4] The evidence is clear that petitioner received no such appointment. Congress, having provided for the temporary enrollment of Government employees in the Coast Guard Reserve who were to be given a rank or rating comparable to their civil service classification, was well aware such provision was in effect when it enacted the above quoted tax exemption section. That it limited the benefits of the $1,500 exclusion specifically to a "commissioned officer (or commissioned warrant officer)" clearly indicates to us that Government employees, holding a temporary rank of commissioned officer, were not to receive the benefit of such tax exclusion.

89 The petitioner argues that if he is not entitled to the $1,500 exclusion as a commissioned officer, his entire civil service compensation of approximately $5,800 is excludable under subdivision (B) "as a member below the grade of commissioned officer". The absurdity of this contention is at once apparent. This subdivision makes no mention of any specific amount which those persons below the rank of commissioned officer are entitled to exclude. No amount was specified because it is a matter of common knowledge that the compensation of members of the military and naval forces of the United States below the rank of the commissioned officers mentioned in the stat-

[4] Section 6, Title 14, United States Code Annotated.

ute is less than $1,500 annually. We think the language of subdivision (B) lends support to our conclusion that Congress advisedly used the terms "commissioned officer (or commissioned warrant officer)" in the sense those terms are used throughout the statutes pertaining to our military and naval forces. We, therefore, conclude that the respondent properly disallowed the claimed exclusion of $1,500 in the respective taxable years 1943 and 1944.

Petitioner's claimed deduction in the taxable year 1944 of the amount of $2,171.10, which would represent the total amount he would have received for subsistence and rental if he had been compensated under the Pay Readjustment Act, also appears to us to be without merit. Petitioner, in fact, received nothing for subsistence or allowance for quarters. The certificate of enrollment of April 24, 1944, which petitioner received, provides, in part, as follows:

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Government employees), except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of:

None.

A commissioned officer in the Coast Guard Reserve is entitled, in addition to his base pay, to certain allowances for subsistence and quarters.[5] Since petitioner was not a "commissioned" officer and in fact received no allowance for subsistence and quarters, he is not entitled to deduct an amount equivalent to such allowances for tax purposes. The respondent's denial of such contested allowances is sustained.

Under the stipulation, the deduction of the amount of $75 claimed as medical expenses was properly disallowed.

Reviewed by the Court.

Decision will be entered for the respondent.

[5] See sections 5 and 6, Pay Readjustment Act, June 6, 1942 (56 Stat. 359), as amended.

91 **Decision**

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated April 21, 1947, it is

Ordered and decided: That there are deficiencies in income tax of $433.59 and $227.10 for the years 1943 and 1944.

(Signed) J. Russell Leech.

Enter:

.....

Judge.

Entered Apr. 22, 1947.

* * * * * * * * * * *

Denied May 22, 1947

(Signed) J. Russell Leech Judge

Filed-May 20, 1947

* * * * * * * * * * *

92 **Motion for Rehearing**

Come now the petitioners in the above-captioned action and move this Honorable Court for a rehearing of the questions presented in this action, and as grounds therefor respectfully submit that they now desire to stress the following newly-made law and offer newly-discovered evidence, which was not available to the petitioners or to this Court at the time of the original hearing, and which could not have been made available at such time by the exercise of due diligence on the part of the petitioners. Said evidence, if is respectfully submitted, has a direct bearing upon the questions of law decided herein, and justifies, it is believed, this Court in rendering a decision favorable to the petitioners instead of one favorable to the respondent, such as was actually rendered under date of April 21, 1947.

New Law

On March 24, 1947, the United States Court of Appeals for the District of Columbia rendered its decision in
93 two cases as yet not appearing in the bound reports,

Mitchell, et al. v. Cohen, Docket No. 9446, and Mitchell, et al. v. Hubickey, Docket No. 9447. The Court there had before it the question of the status of two former members, temporary, of the United States Coast Guard Reserve, under the Veterans Preference Act of 1944, 58 Stat. 387, 5 U.S.C.A., Sec. 851, Act of June 27, 1944. It was held that Cohen and Hubickey were entitled to their rights as "ex-servicemen" under the said Act after an exhaustive review by the Court of their status in the Coast Guard Reserve, the functions they performed therein and the consequences flowing therefrom. While a slip copy of this decision was sent to the Clerk of this Court about three weeks before the decision was rendered herein, petitioners did not have full opportunity to argue the highly persuasive, if not controlling, character of the opinion of the D. C. Court of Appeals.

The full opinion is attached hereto, marked Exhibit 1, and prayed to be read as a part of this motion.

New Evidence

The petitioners in their brief cited on pages 11 and 12 excerpts from certain court-martial orders and pronouncements by the Judge Advocate General of the Navy as to the status so far as his Department was concerned of members, temporary, of the Coast Guard Reserve. Since the time of the preparation of their brief, the petitioners have had access to the record of the general court-martial of Richard S. Belli, a member, temporary, of the Coast Guard Reserve and of the opinion on review by Read Admiral T. L. Gatch, Judge Advocate General of the Navy, as well as the opinion on review of the Honorable James V.
94 Forrestal, then the Acting Secretary of the Navy.

The said two opinions are attached hereto, marked respectively Exhibits 2 and 3, and prayed to be read as a part hereof.

As a result of the occurrence out of which grew the court-martial of the above Richard S. Belli, three other members,

temporary, of the Coast Guard Reserve were tried and convicted by a general court-martial. Upon review, their respective sentences were mitigated, but in none of the cases was the plea to the court's jurisdiction over the accused successful. In other words, the pronouncements in the general court-martial orders in the petitioners' brief were actually carried out in general courts-martial, and show conclusively that the members of the Temporary Coast Guard Reserve were subject to Naval discipline and considered to be in the Armed Service.

Matter for Reconsideration

In addition to the foregoing, a further reason exists for a rehearing and reconsideration of this case. In its decision, among other things, the court apparently places much reliance upon Section 6, Title 14, United States Code Annotated. The Court correctly points out that under that section "Commissioned officers of the Coast Guard are appointed by the President." It is admitted that petitioner, William I. Connelly, received no such appointment.

The Court's attention, however, is respectfully invited to the fact that the abovementioned Section 6 is concerned solely with the commissioning of regular Coast Guard officers. The said petitioner never has claimed to have
95 been a regular Coast Guard officer or to have enjoyed any rights whatsoever under Section 6, which was enacted in 1915.

Instead the said petitioner claims his rights under the Act of Congress approved February 19, 1941, Sections 301, *et seq.* as amended by the Act of November 23, 1942 (part of Subchapter II of Chapter 9 which created the Coast Guard Reserve). Section 301 says, in part:

"There is hereby created and established a United States Coast Guard Reserve (hereinafter referred to as the 'Reserve') the purpose of which is to provide a trained force of *officers* and enlisted personnel * * *"

Under Section 307,

"The Commandant * * * is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, * * * such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, * * *, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective, ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve."

The petitioner, William I. Conaelly, was "enrolled" in the temporary reserve of the Coast Guard under Section 307 by the Commandant with the rank of Lieutenant Commander. A Lieutenant Commander in the Coast Guard is a Commissioned Officer by definition.

Under the Constitution of the United States, Congress is charged with the duty of providing and maintaining a Navy, Article I Sec. 8, and by the passage of various
96 laws can provide any method of appointment, or enrollment, of commissioning of officers it may see fit. The Act of February 19, 1941, amended November 23, 1942, provided that the Commandant of the Coast Guard should have a power which was ordinarily vested in the President, or delegated to a Cabinet Officer. The Commandant was authorized to enroll officers, not over the rank of Captain, (See Sec. 303) in the Coast Guard Reserve on a temporary basis if they conformed to certain strict specifications. The petitioner, William I. Connelly, so conforming, was "enrolled" as a Lieutenant Commander.

The petitioner was on full time active duty during the period in question. He performed no civil service work

whatsoever. What he was being paid for was his work, which then consisted of tasks properly assignable in time of war to a Lieutenant Commander. It is submitted that by the simplest reasoning, defining the words as used in daily conversation, the petitioner was being paid for "active duty" as a "commissioned officer." The fact that his superior officers saw fit to assign him to tasks with which he was thoroughly familiar by reason of his work in the past as a civilian cannot negative the military nature of that work in time of war or the fact that he was a commissioned officer.

It is therefore respectfully submitted that the Court hold a rehearing for the purpose of giving effect to the above new law and new evidence and that its decision be reconsidered in the light of the foregoing.

CAESAR L. AIELLO
Attorney for Petitioner

* * * * * * * * * *

109 Filed Jul 16 1947

Stipulation as to Venue

The Petitioners and Respondent, by their respective attorneys, hereby stipulate, in accordance with the provisions of Section 1141(b)(2) of the Internal Revenue Code, that the decision of the Tax Court of the United States in the above entitled cause may be reviewed by the United States Court of Appeals for the District of Columbia.

CAESAR L. AIELLO

A. MURRAY PRESTON
Counsel for Petitioners,
901 Hibbs Building,
Washington 5, D. C.

SEWALL KEY
Acting Assistant Attorney General

* * * * * * * * * *

110 Filed Jul 16 1947

Petition for Review by the United States Court of Appeals for the District of Columbia, of the Decision by the Tax Court of the United States

William I. Connelly and Bertha Connelly, his wife, Petitioners herein, by Caesar L. Aiello and A. Murray Preston, their counsel, hereby petition for a review by the United States Court of Appeals for the District of Columbia, of the decision of the Tax Court of the United States, rendered April 21, 1947, in connection with which a motion for rehearing and reconsideration was denied on May 22, 1947, wherein the Tax Court of the United States determined that deficiencies in income taxes for the taxable years 1943 and 1944 in the respective amounts of $433.59 and $227.10 were proper and lawful. Said deficiencies grew out of the disallowance by Commissioner of Internal Revenue, among other things, of the following items:

1. A tax exclusion of $1,500 in the respective taxable years, as provided by Section 23(b)13, I.R.C., as amended by the Revenue Act of 1945, being an additional allowance for military and naval personnel during the recent World War II.

2. An amount of $2,171.10, which was deducted by Petitioners for the taxable year 1944, and represents the allowance for quarters and subsistence of a commissioned officer in the United States Coast Guard Reserve.

111 The Petitioners and Respondent, through their respective attorneys, have entered into a stipulation, pursuant to Sec. 1141 (b)(2) of the Internal Revenue Code, designating the United States Court of Appeals for the District of Columbia for the review of the decision which is the subject of this petition.

I

William I. Connelly and Bertha Connelly are husband and wife, citizens of the United States, and residents of Falls Church, Virginia. Their returns for the taxable years

involved herein were filed with the Collector of Internal Revenue for the District of Virginia. Mrs. Connelly's income tax liability is not involved herein, and this controversy stems from the status of William I. Connelly as a temporary member of the United States Coast Guard Reserve during World War II.

II

William I. Connelly, hereinafter referred to as "Petitioner," enrolled as a temporary member of the U. S. Coast Guard Reserve for the duration of the war, on February 19, 1943, with the rank of Lieutenant Commander, under the provisions of the Coast Guard Auxiliary and Reserve Act of 1941, as amended by the Act of November 23, 1942 (U.S.C.A. Title 14, Sec. 307), reading as follows:

"The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe,
112 including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowance of their

respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve."

III

Said Petitioner, immediately upon enrollment, was ordered to full time active duty at Coast Guard Headquarters. While on active duty he was vested with all of the rights, privileges, powers and duties of a regular member of the Coast Guard of the same rank, and was subject to all laws and regulations for the government of the Coast Guard and its Reserve.

IV

During his enrollment, Petitioner was required to obtain and wear the identical regulation uniforms provided for the regular (commissioned) officers of the Coast Guard, for which he was granted the customary uniform allowance of $250 given to all newly commisioned officers of the Navy and Coast Guard. He was required to conform to naval and Coast Guard regulations respecting the wearing of the uniform, and all of the regulations promulgated
113 for the governance of members of the Navy, Coast Guard and Coast Guard Reserve.

Moreover, Petitioner, because of his status and rank, was entitled to the use of the postal franking privilege; to make purchases from ship service stores; membership in the Coast Guard wine mess; use of military and naval cafeterias; the military tobacco ration card; use of the naval and Public Health Service facilities and hospitalization; use of the war ballot while absent from his state of domicile; and he was expressly authorized to wear the American Campaign Medal and the World War II Victory Medal. He exercised military authority over commissioned officers of the Coast Guard Reserve junior in rank to him who were assigned to duty in his office; and was in turn required to respond to the military commands of his superior officers. He was entitled to the usual military courtesies, and was

required to observe military etiquette at all times. None of the foregoing was required of or available to civilian or civil service employees of the United States; they are incident to active service in the armed forces of the United States in World War II; and, as the final reward, Petitioner, as a veteran, is entitled to interment in a National Cemetery. He was subject to court martial, just like any other member of the Navy, Coast Guard and Coast Guard Reserve, and by decision of this Court is entitled to civil service preference as a veteran under the so-called G.I. Bill of Rights (Mitchell v. Cohen, No. 9447, decided Jan. 24, 1947).

114

V

Prior to his enrollment, Petitioner was an employee of the United States Coast Guard, in the capacity of senior attorney, grade P-5, and performed legal duties in the capacity of Chief, Admiralty and Maritime Section, Legal Division, Coast Guard Headquarters. During and after his enrollment he received for the services and duties assigned to him the compensation of his civilian position.

VI

Effective March 16, 1944, the civil service position which Petitioner held was reclassified from grade P-5 to grade P-6, and effective of that same date, he was advanced to the rank of Commander, Class T, Coast Guard Reserve, which rank he held until September 15, 1945, when he was honorably disenrolled as a member of the Coast Guard Reserve.

VII

In their returns for the years 1943 and 1944, Petitioners claimed as an exclusion from the income of Petitioner, William I. Connelly, for those years, the annual allowance of $1,500 provided by law for military and naval personnel, and also deducted from income received from the United States Coast Guard for the taxable year 1944, the sum of $2,171.10,

which represents the allowance for quarters and subsistence of a commissioned officer in the United States Coast Guard Reserve for that year. Both items were disallowed by the Respondents, upon the ground that the Petitioner, William I. Connelly, was in a civilian status and performed
115 civilian duties during the period of his enrollment, and further because his compensation was derived from a civilian Government appropriation making the entire amount of his compensation subject to Federal income tax, holding in effect that where an individual receives pay from civilian sources or from a civilian government payroll, such compensation is regarded as not being remuneration for services as a member of the military or naval forces within the intendment of Section 23(b)(13) of the Internal Revenue Code.

VIII

The Tax Court of the United States affirmed the Respondent's action, by holding that Petitioner was not a commissioned officer of the Coast Guard Reserve, and, accordingly, was entitled neither to the tax exclusion of $1,500 in the respective taxable years, nor an allowance for quarters and subsistence.

Petitioners, being aggrieved by the Findings of Fact and Conclusions of Law of said Tax Court of the United States, desire to obtain a review thereof by the United States Court of Appeals for the District of Columbia.

WILLIAM I. CONNELLY
and
BERTHA CONNELLY
By CAESAR L. AIELLO
A. MURRAY PRESTON,
Counsel for Petitioners,
901 Hibbs Building,
Washington 5, D. C.

116 DISTRICT OF COLUMBIA, ss:

William I. Connelly and Bertha Connelly, being first duly sworn, on oath depose and say that they are the Petitioners named in the foregoing petition; that they have read the same and are familiar with the contents thereof; that the statements therein contained are true, to the best of their knowledge, information and belief.

WILLIAM I. CONNELLY
BERTHA CONNELLY

SUBSCRIBED and sworn to before me this 16th day of July, 1947.

ELIZABETH MAYNARD
Notary Public, D. C.

117 Filed Jul 16 1947

Statement of Points in Review

To: E. M. Woolf, Esq.,
Counsel for Respondent.

The parties seeking review of the decision of the Tax Court of the United States in the above entitled cause rely on the following points on review:

1. A temporary member of the United States Coast Guard Reserve, holding the rank of Lieutenant Commander and (later) Commander, assigned to full time, active, special duty in the Coast Guard was a "member of the * * * naval forces of the United States" during World War II.

2. A temporary member of the United States Coast Guard Reserve, holding the rank of Lieutenant Commander and (later) Commander, assigned to full time, active, special duty in the Coast Guard was a person on "active service" in the naval forces of the United States during World War II.

3. A temporary member of the United States Coast Guard Reserve, holding the rank of Lieutenant Com-

118 mander and (later) Commander, assigned to full time, active, special duty in the Coast Guard is entitled to the exclusion of $1,500 provided by Sec. 22(b)(13) of the Internal Revenue Code, and allowance for quarters and subsistence.

4. The compensation received by a temporary member of the United States Coast Guard Reserve, holding the rank of Lieutenant Commander and (later) Commander, assigned to full time, active, special duty in the Coast Guard was remuneration for service as a member of the military or naval forces, within the meaning of Sec. 22(b)(13) of the Internal Revenue Code, notwithstanding that such compensation came from a civilian government appropriation.

5. A temporary member of the United States Coast Guard Reserve holding the rank of Lieutenant Commander and (later) Commander, assigned to full time active special duty in the Coast Guard, is a "commissioned officer" within the meaning and intent of 14 United States Code Sec. 307, and therefore is entitled to the exclusions permissible under Sec. 22(b)(13) of the Internal Revenue Code, and allowance for quarters and subsistence.

CAESAR L. AIELLO

A. MURRAY PRESTON
Counsel for Petitioners,
901 Hibbs Building,
Washington 5, D. C.

120 Filed Jul 16 1947

Designation of Record

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the District of Columbia, with reference to the petition for review heretofore filed by the petitioners in the above

cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) Petition, with exhibits
(2) Answer
(3) Stipulation of Facts, with exhibits
(4) Transcript of Testimony, with exhibits
(5) Decision of the Tax Court, promulgated April 21, 1947
(6) Motion for Rehearing and Reconsideration, denied May 22, 1947, with exhibits
(7) Statement of Points
121 (8) Stipulation of Counsel as to Jurisdiction
(9) This Designation of Record

CAESAR L. AIELLO

A. MURRAY PRESTON
Counsel for Petitioners,
901 Hibbs Building,
Washington 5, D. C.

Dated this 16th day of July, 1947.

• • • • • • • • • •

United States Court of Appeals for the District of Columbia Circuit

No. 9620

WILLIAM I. CONNELLY and BERTHA CONNELLY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of Decision of the
Tax Court of the United States

Argued December 7, 1948 Decided January 24, 1949

Mr. A. Murray Preston and *Mr. Caesar L. Aiello*, with whom *Mr. John Spalding Flannery* was on the brief, for petitioners.

Mr. Meyer Rothwacks, pro hac vice, by special leave of Court, with whom *Mr. Lee A. Jackson*, Special Assistant to the Attorney General, was on the brief, for respondent. *Mr. Carlton Fox*, Special Assistant to the Attorney General, *Mr. Ellis N. Slack*, Attorney, Department of Justice, *Mr. Charles Oliphant*, Chief Counsel, Bureau of Internal Revenue, and *Mr. Bernard D. Daniels*, Special Attorney, Bureau of Internal Revenue, also entered appearances for respondent.

Before EDGERTON, CLARK and PRETTYMAN, JJ.

PRETTYMAN, J.: This case is here upon a petition to review a decision of the Tax Court of the United States.

Petitioners are husband and wife. They filed joint income tax returns for 1943 and 1944 and claimed in each year as an exclusion from gross income $1,500 under authority of Section 22(b)(13)(A) of the Internal Revenue Code. On the return for 1944, they also excluded $2,171.10 under authority of Section 29.22(a)-3 of Treasury Regulations 111. The Commissioner disallowed the exclusions, and the Tax Court upon petition for redetermination, affirmed the disallowances.[1]

The provision of the statute relating to the $1,500 exclusion was, in the years involved, as follows:

> "Additional allowance for military and naval personnel.
>
> "(A) In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such a war, or, in the

[1] William I. Connelly, 8 T. C. 848 (1947).

case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, so much of such compensation as does not exceed $1,500."

The provision of the Regulations relating to the claimed $2,171.10 is as follows:

"The value of quarters furnished to the commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Army, Navy, Coast Guard, Coast and Geodetic Survey, and Public Health Service, or amounts received by them as commutation of quarters, are to be excluded from gross income . . . ."

The commutation of quarters problem is quickly solved. Petitioner[2] was furnished no quarters and received no commutation of quarters. The view of the Tax Court on that item was plainly correct.

The statutory allowance for naval personnel presents a different question. Prior to March 1, 1942, petitioner was employed in the Office of the Solicitor of the Department of Commerce. On that day, his group was transferred by Executive Order No. 9083[3] to the Coast Guard, and he with it. On the 19th of February, 1943, he was enrolled as a Lieutenant Commander in the Coast Guard Reserve, took the oath of office, and was placed on full-time active duty. He was officially notified: "While on active duty, you are vested with all the rights, privileges, powers and duties of a regular member of the Coast Guard Reserve of the same rank or rating, and you are subject to all laws and regulations for the government of the Coast Guard and its Reserve." Thereafter, he was under authority of the Coast Guard twenty-four hours a day and was subject to its laws, regulations and orders and to naval disciplinary action for offenses committed. He was required to wear the Coast Guard uniform, was authorized to wear campaign ribbons and to use the postal franking privilege and the naval mess, received a naval personnel ration card, and had access to medical facilities of the Navy. According to an Office Memorandum issued by the Commandant of the Coast Guard on July 24, 1943, upon the subject:

"2. It is desired to impress upon all heads of offices, chiefs of divisions, and all regular and Reserve personnel that, while engaged on active duty, as set forth and described in his certifi-

[2] For simplicity's sake, we shall use that term to refer to the husband.
[3] 7 FED. RE. 1609.

cate of temporary enrollment, a temporary member of the Reserve has the same power, authority, rights and privileges as members of the regular Coast Guard of similar rank, grade, or rating in the execution of the duty assigned to him.

* * * * * *

"6. The attention of heads of offices and chiefs of divisions is invited to the fact that one of the principal reasons for the induction of civil service employees into the military establishment as temporary members of the Reserve was to obtain a homogeneous organization on a military basis and to eliminate differences in procedure and practices applicable to military personnel and civil service personnel engaged on exactly the same duty; and this memorandum is issued in order to effectuate that policy."

On the other hand, petitioner was not exempt from liability for training and service under the Selective Training and Service Act of 1940, as amended. During the period of his enrollment, he continued to receive for his services and the duties assigned to him compensation from congressional appropriations allocated to pay for civilian positions. Deductions for Civil Service retirement were continued, and petitioner was still governed by Civil Service regulations for annual and sick leave and received overtime pay for services in excess of 40 hours a week.

The Commissioner of Internal Revenue disallowed the exclusion upon the ground that Commander Connelly was serving "in a civil status" and received his pay "from a civilian government payroll". The Tax Court held that he was not a commissioned officer.

The dispute arises on account of two features of the case. The duties which were performed by Commander Connelly's organization, and by him, as part of the Coast Guard, under naval command, during the war, were the same as, or similar to, the duties which they had performed in the Department of Commerce before the war and before their transfer and induction. This similarity, or identity, of duties seems to cause vast confusion. Because of it, Commander Connelly is said not to be an officer in the Coast Guard.

We do not see how similarity of duties can erase the distinction between civilian and military service. If it be attempted, an appalling confusion would arise. All sorts of questions would be presented as to the thousands of industrialists who were inducted or commissioned and assigned to operate plants, or to command patrol boats, and as to military personnel on duty at the Pentagon, and as to quartermaster and supply corps personnel dealing in clothing and equipment, and so on *ad infinitum*. We do not know why the Executive Department of the Government chose to translate

each of scores of civilian operations into military and naval operations for the conduct of the war; and to induct into the military and naval services the accompanying personnel. And it is not our function to inquire why, although common sense indicates that total war is best conducted by military methods, means and men throughout. We know that it was done, and that is sufficient for our purposes.

We had a somewhat similar problem in *Mitchell* v. *Cohen*.[4] We there pointed out that the critical characteristics which differentiate civilian from military personnel have long been established.[5] The oath of office is the major incident. We need not repeat the extended discussion of that opinion. The Supreme Court defined ex-servicemen "for the purpose of [that] particular statute," as not including the particular persons there involved.[6] But the Court did not reject or question the standards which we there recited for the determination of status, as civilian or military, generally. Therefore, we adhere to those views for purposes other than that statute. The situation is not unlike the transformation of status from the bar to the bench. One minute a person has no power save his own influence and receives compensation for his legal opinions. Two minutes later he is invested with lawful power over life and property, and the receipt of compensation for his opinions is a felony. The sole occurrence in those two minutes has been that he took an oath of office, pursuant to appointment and designation of duty.

It is our view that if the courts embark upon a process of separating military from non-military status for each and every recurrent purpose, upon the basis of an evaluation of time, pay, duty, privileges, etc., the process will be interminable and the ultimate result complete chaos. The enthusiasm, the panegyrics, and indeed the real and dire necessity, with which government translates personnel from civilian to military status for the purposes and needs of war, and the equal and opposite rescission of those attitudes when the war is over, are notorious in history and fiction. Of course, Congress may make differentiations and classifications almost as it pleases. But when Congress chooses not to make them, it is not for the courts to do so. When, for purposes of war, the Executive Department translates civilian duties into military duties and inducts personnel from civilian status to military status, and when Congress enacts legislation applying to military duties and

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[4] 82 U. S. App. D. C. 83, 160 F. 2d 915 (1947).

[5] *United States* v. *Tyler*, 105 U. S. 244, 26 L. Ed. 985 (1882); *United States* v. *Morton*, 112 U. S. 1, 28 L. Ed. 613, 5 S. Ct. 1 (1884); *Billings* v. *Truesdell*, 321 U. S. 542, 88 L. Ed. 917, 64 S. Ct. 737 (1944); and other cases cited in *Mitchell* v. *Cohen*, *supra*.

[6] 333 U. S. 411, 421, 92 L. Ed. ——, 68 S. Ct. 518 (1948).

military personnel, without further definition, the courts should simply accept those determinations. In such cases, the courts, in our view, should simply apply the long-established criteria—oath of office, military duty, and subjection to military discipline.

We are urged to ascertain an unexpressed intendment in the revenue act. The language of that act is direct and unadorned. It grants an allowance "In the case of compensation received . . . for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war". If Commander Connelly fits those clear requirements, he is entitled to the allowance. We think that no hindsight, subtlety or assumed mental reservation on the part of Congress should deprive him of it.

The Tax Court held the Commander to be not a commissioned officer because he was not commissioned by the President, but instead was inducted into office directly by the Coast Guard authorities. The Tax Court relied upon Section 6 of Title 14, United States Code. But the Coast Guard Auxiliary and Reserve Act of 1941[7] provides that the Commandant of the Coast Guard may confer upon these men the same ranks as are provided for the regular Coast Guard. By that statute, for the purposes of that war, the Commandant could confer upon certain persons the rank and status of a commissioned officer. He did so in the case of this petitioner. Commander Connelly had the authority, the title, the duties and the obligations of a commissioned officer. He was sworn in as such, by congressional authority. He was certainly serving and acting "as a commissioned officer", and that is what the tax statute requires.

The second feature which gives rise to the dispute, is the nature of petitioner's pay. He was on full-time active service, and he was compensated. But the Commissioner points to that part of the Coast Guard Auxiliary and Reserve Act (Sec. 207, *supra* note 7) which referred to the enrollment of "Government employees without pay other than the compensation of their civilian positions". He argues that petitioner, being in that category, did not receive "military pay". The revenue act does not use that term. Its term is "compensation . . . for active service". To reach the conclusion that petitioner's compensation was not for service in the naval forces, we would have to hold that he worked full time for no compensation while, at the same time, he received full compensation for no work. The facts are that he was engaged in full-time active duty in the naval forces, and he received compensation. We think he received the compensation for the work.

[7] Sec. 207, 55 STAT. 12, as amended, 56 STAT. 329, 990, 1021 (1942).

It is our conclusion that this petitioner received compensation for active service as a commissioned officer in the naval forces of the United States during the war. That he was on such service as such an officer was by executive action pursuant to congressional authority. That his induction and status were not accomplished by the usual peacetime formalities, and that his pay was specified by a congressional enactment apart from other more general specifications of pay for military or naval service, are immaterial. It is not for the courts to tell the executive and legislative branches how they should have conducted the war. Petitioner is, therefore, entitled to the allowance of $1,500 as an exclusion from income for income tax purposes, under Section 22(b)(13)(A) of the Internal Revenue Code. The judgment of the Tax Court is, therefore, reversed on that point.

Reversed in part, affirmed in part, and remanded for further proceedings in accordance with this opinion.

EDGERTON, J., *dissenting in part*: I think the Tax Court was right. The petitioner has no claim to the statutory privileges of "ex-servicemen," *Mitchell* v. *Cohen*, 333 U. S. 411, and it seems to me still clearer that a man who was not commissioned was not "a commissioned officer"; also, that a man subject to draft was not a commissioned officer. Even if he had been a commissioned officer I would be unable, in view of the rule that tax exemptions are strictly construed, to say that the compensation of a man who did not receive a commissioned officer's pay but served "without pay other than the compensation of [his] civilian positions" was "received . . . for active service as a commissioned officer."

United States Court of Appeals for the District of Columbia Circuit. Filed Jan. 24, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit, January Term, 1949

No. 9620

WILLIAM I. CONNELLY AND BERTHA CONNELLY, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of Decision of Tax Court of the United States

Before: EDGERTON, CLARK and PRETTYMAN, JJ.

Judgment

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of the said Tax Court on review in this cause be, and the same is hereby, reversed in part and affirmed in part, and that this case be, and it is hereby, remanded to the said Tax Court for further proceedings in accordance with the opinion of this Court.

Per Circuit Judge Prettyman.

Dated January 24 1949.

Opinion by Circuit Judge Edgerton dissenting in part.

United States Court of Appeals for the District of Columbia Circuit. Filed April 1, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 9620

WILLIAM I. CONNELLY AND BERTHA CONNELLY, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition for certiorari to the Supreme Court of the United States in the above-entitled cause, and include therein the following:

1. Joint Appendix to Petitioners' Brief.

2. Opinion of the Court of Appeals.

3. Judgment of the Court of Appeals.

4. This Designation.

5. Clerk's Certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Respondent.
CAESAR L. AIELLO,
A. MURRAY PRESTON,
Counsel for Petitioners.

March 31, 1949.

United States Court of Appeals for the District of Columbia Circuit

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 60, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of William I. Connelly and Bertha Connelly, Petitioners, v. Commissioner of Internal Revenue, Respondent, No. 9620, January Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fourth day of April, A. D. 1949.

[SEAL]

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

In the Supreme Court of the United States, October Term, 1948

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM I. CONNELLY AND BERTHA CONNELLY, RESPONDENTS

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Joint Appendix to Petitioners' Brief.

2. Proceedings had before the United States Court of Appeals for the District of Columbia.

It is further stipulated and agreed that Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on petition to the United States Court of Appeals for the District of Columbia Circuit; and that, in the event that the petition for certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcript of record on petition to that court as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.
CAESAR L. AIELLO,
Counsel for Respondents.

March 31, 1949.

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Supreme Court of the United States

Order allowing certiorari

Filed June 6, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.